

Ho (Migration) [2018] AATA 1536 (25 May 2018)

DECISION RECORD

DIVISION:	Migration and Refugee Division
APPLICANT:	Mr Bang Giang Ho Mr Hoang Son Ho
CASE NUMBER:	1604590
DIBP REFERENCE(S):	BCC2014/3402061
MEMBER:	Helen Kroger
DATE:	25 May 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for Partner (Temporary) (Class UK) visa, with the direction that the primary applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 25 May 2018 at 10:24am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) visa – Whether there is a genuine and continuing relationship – Shared household expenses – Parties lived in the same unit with their children since October 2014 – Applicant and sponsor mutually support and care for their son and daughter – Shared household expenses – Parties represent themselves to other people as being married – Compelling witness statements – Further evidence available before the Tribunal – Decision under review remitted for consideration

LEGISLATION

Migration Act 1958 ss 5F, 338, 347

Migration Regulations 1994 r 1.15A Schedule 2 cls 820.211, 820.221

VISA APPLICATION REVIEW – SUB CLASS 820

1. The visa Review Applicant (the applicant) applied to the Department for the visa on 11 December 2014.
2. The delegate refused to grant the visa on 22 March 2016 on the basis that the primary visa applicant did not satisfy cl.820.211(2) of Schedule 2 to the Migration Regulations 1994 (Regulations). The criteria for the grant of the visa are set out in Part 820 of Schedule 2 to the Regulations. The primary criteria must be satisfied by at least one applicant.
3. On 4 April 2016 the visa applicant made a valid application (under s.347 of the Act) for review of the delegate's decision (reviewable under s.338(2) of the Act).
4. The applicant attended a hearing before the Tribunal on 23 May 2018 to give evidence and present arguments. The secondary applicant appeared before the Tribunal along with the applicant's sponsor (and wife) Ms Tien My Truong , the sponsor's daughter and two further witnesses who described themselves as friends. The applicant's registered migration agent attended and the parties were assisted with the services of an interpreter.

BACKGROUND

5. Based on all the documentary and oral evidence before the Tribunal, it is satisfied the facts of this case are as follows. The applicant arrived in Australia in 2008 on a student visa. He was formerly twice married and divorced, effective on 12 March 2003 and again in October 2014. He has sole custody of his son, the secondary applicant. Neither applicants have any contact with the former wife/mother. The primary applicant and sponsor met at a 2014 Vietnamese Tet festival at a Buddhist Temple in Keysborough and they became friends, occasionally sharing a meal or coffee. The parties discovered they came from the same city, My Tho, in the Mekong Delta region, and the relationship slowly developed. The sponsor submitted to the Tribunal that she was not looking to start a relationship when they first met. The applicant and his son moved in with the sponsor in October 2014 and married very shortly after. Evidence was provided to the Tribunal regarding cultural considerations that discouraged parties from living together out of wedlock.
6. The sponsor owns her own unit, and oral submissions indicated that this was a consideration in the applicants moving in to her home with her daughter. The parties have lived in the same unit with their children since October 2014. Both parties work full time and the secondary applicant is a full time student.

ISSUE

7. The issue is whether the applicant is the spouse or de facto partner of her sponsor.

Whether the parties are in a spouse or de facto relationship

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In this case, the Tribunal is satisfied that the sponsor is an Australian citizen, and sighted a certified copy of the passport.

Are the parties validly married?

9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
10. The Tribunal has had regard to a certified copy of the parties' Marriage Certificate showing that the parties married in a private service on 16 November 2014 in Springvale South. On the evidence, the Tribunal is satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

11. Regulation 1.15A(3) provides relevant factors for determining whether a spouse relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the person's commitment to each other.
12. In assessing these issues, the Tribunal has had regard to the documents and evidence provided to the Department and the Tribunal. The Tribunal notes that much of the evidence provided was not available to the delegate when the application was first submitted to the delegate on 29th April 2015, with a quantity of original documentation and photos being tabled with the Tribunal before the hearing.

The financial aspects of the relationship

13. The Tribunal must consider all the financial aspects of the relationship including any joint ownership of real estate or other major assets; any joint liabilities; the extent of any pooling of financial resources (especially in relation to major financial commitments); whether either person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day to day household expenses.
14. The applicant and sponsor both work full time in "packing"/warehouse type jobs. The unit they reside in is owned by the sponsor and the title stands in her name. It is a property she took over following her first divorce. In a compelling comment, the sponsor submitted to the Tribunal that she had more than the applicant, that he was in greater need, and that she was very happy for him and his son to move into her unit in the month prior to their marriage. Documentation was provided to the Tribunal before and on the day of the hearing showing the cash flow of income through joint bank accounts and an account she had prior to their marriage. Household expenses are shared including the payment of the secondary applicant's school fees – a total sum to date of around \$19,000. Whilst the sponsor assumes overall management of the household finances, it is apparent that this is with the input of the applicant.
15. The Tribunal finds that whilst the parties do not share any significant financial or property assets or debts, and that the unit remains in the sponsor's name, documentation indicates shared responsibility for some accounts and household expenses, and evidence suggests that this has evolved over time, depending on financial necessities. The Tribunal gives some weight to the parties attested shared management and responsibility for their household finances.

The nature of the household

16. In assessing the nature of the household, the Tribunal gives weight to evidence of joint responsibility or shared responsibility for housework and chores, for the care and support of any children (where relevant), the living arrangements of the parties and any sharing of the responsibility for housework.
17. Evidence was provided at the hearing to indicate the living arrangements of the household, how those arrangements exist in a 3-bedroom unit with 3-4 adults (including the 15 year old daughter), and how the parties have made the circumstances work. Both the secondary applicant and the daughter provided compelling witness statements that reflected on their personal perspectives of their parents' decision at the time of their marriage and how they view it now. The secondary applicant admitted to "being confused" at first but "is happy if Dad is". Likewise the daughter indicated she wasn't so sure about it but is assured it is the right thing by the happiness reflected in her mother's face. She told the Tribunal that she didn't like to go out with friends before and leave her mother home on her own as she felt she was lonely.
18. The applicant and sponsor mutually support and care for their son and daughter. The Tribunal recognises that the children are of an age where they are more independent, but the evidence indicates that the parties share financial support for both to study and support their day to day needs. The sponsor does all the cooking for the family and the applicant supports by cleaning the dishes. They do the weekly shop together in Springvale, for the meals for the following week. The sponsor does the laundry and as the unit is part of a 'body corporate', there is very little outside maintenance required. The daughter and son contribute little to the household tasks.
19. On the evidence provided, the Tribunal notes that the sponsor primarily assumes responsibility for most household tasks and is supported in her endeavours in many small ways by the applicant. There is clear joint responsibility for supporting and caring for their children. The Tribunal finds that whilst the applicant provides a limited manual contribution in the household, there is significant joint responsibility for their family.
20. The Tribunal is satisfied that there is a demonstrative sharing of household responsibilities and places some weight on these aspects.

9. The social aspects of the relationship

10. 21. In assessing the social aspects of a relationship the Tribunal must have regard to all the social circumstances of the relationship including whether the persons represent themselves to other people as being married to each other; the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.
11. The parties first met at a Vietnamese Buddhist Temple in Keysborough for a 'Tet' New Year's celebration. The applicant and sponsor have maintained their interest at the Temple, attending special events and cultural celebrations. The Tribunal has receipt of a number of photos that show some of these celebrations. The two witnesses attending the hearing, gave evidence of their meaningful friendship with the applicant and sponsor respectively. Mr Tran, a friend of the applicants', gave convincing and compelling testimony about the nature and history of their relationship, his reflections

on the character and attitude of the applicant prior to his marriage and his observations subsequently. It was a persuasive tribute to a friend (and a relationship), who he said deserved to be given “a second chance”. The applicant has four sisters who live in Australia with their families. The parties live a relatively modest and quiet life, working and supporting their children whilst occasionally attending an event or meeting friends for dinner.

12. The Tribunal finds that the applicant and sponsor engage with family and friends in a limited way and participate in significant cultural special events and occasions. Tribunal is satisfied that the parties represent themselves to other people as being married.

13. The nature of the person’s commitment to each other

14. In assessing commitment to each other, the Tribunal must have regard to the duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other and whether the persons see the relationship as a long term one.
15. The Tribunal has had regard to the duration of the claimed relationship, that they first met in 2014, moving in with each other in October 2014 and having lived continuously together since then.
16. The parties were questioned about the nature of the personal and emotional support they provide to each other. The witnesses at the hearing commented on the parties’ “healthy manner” to each other, their respectful relationship and how they both demonstrated their happiness since their marriage. Mr Tran spoke of the applicant’s propensity to speak and sympathise about those who have less than what they share rather than reflect on their own limited means. The applicant, whilst quiet and conservative in nature, showed compassion and empathy when speaking about his sponsor and her family.
17. The Tribunal is satisfied that the parties provide ongoing emotional support and companionship to each other and present as a couple committed to having a future together, whilst noting that the motives, hopes and wishes of both parties may not be consistent.
18. After having regard to the circumstances of the parties relationship, the Tribunal finds the parties demonstrate a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing.

FINDINGS

19. The Tribunal finds from all the evidence the parties are married to each other under a marriage which is valid for the purposes of the Act, and therefore at the time of application and time of decision the parties meet s.5F(2)(a).
20. The Tribunal is satisfied that at the time of application and the time of decision the applicant and the sponsoring partner have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is satisfied that the relationship is genuine and continuing. They therefore meet the requirements of s.5F(2)(b) and s.5F(2)(c) for a married relationship.

21. Additionally, the Tribunal is satisfied that at the time of application and time of decision the applicant and the sponsoring partner live together. Accordingly, they meet the requirements of s.5F(2)(d) for a married relationship.
22. For these reasons, the Tribunal finds that at the time of application and time of decision the applicant and the sponsoring partner are in a married relationship within the meaning of s.5F(2) and therefore satisfy the definition of 'spouse' contained in s.5f.
23. The Tribunal is satisfied that at the time of application, and time of decision, the applicant was the spouse of the person who is an Australian citizen, that the applicant was sponsored by that person. The Tribunal finds that there is no evidence before it which indicates that the sponsor was prohibited from being a sponsoring partner under cl.820.211(2B).
24. Accordingly the applicant meets the requirements of cl.820.211(2)(a) and (c).
25. Given these findings, the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore the applicant meets cl.820.211(2) and cl.820.221.
26. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
- 27.
- 28.

DECISION

29. The Tribunal remits the application for Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).